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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SINDICATO DE EMPLEADOS Y
TRABAJADORES DE LA INDUSTRIA,
EL CAMPO Y EL COMERCIO DEL
ESTADO 29 C.R.O.M., a Mexican labor
union, and SINDICATO NUEVA
GENERACION DE TRABAJADORES DE
BAJA CALIFORNIA C.R.O.C., a Mexican
labor union,

Plaintiffs

v.

CREDIT MANAGERS ASSOCIATION
OF CALIFORNIA, INC., dba CMA
BUSINESS CREDIT SERVICES, a
California non-profit corporation,

Defendants.

Case No. 07CV2365

DEFENDANTS' OPPOSITION TO
PLAINTIFFS' EX PARTE
APPLICATION FOR A TEMPORARY
RESTRAINING ORDER AND
PRELIMINARY INJUNCTION

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I. INTRODUCTION

Plaintiffs have burdened this Court with a procedurally improper ex parte application for a temporary restraining order. First, Plaintiff fail to cite, must less establish, any statutory grounds for this Court to restrain a lawful state court proceeding. Without express statutory grounds to enjoin a state court proceeding, this Court is without authority to enter an order in this action to restrain the underlying state court proceeding. Second, Plaintiffs have failed to establish that they are the real party in interest or that this Court has jurisdiction to settle the dispute asserted in Plaintiffs' complaint. Third, Plaintiffs have failed to join or provide notice to an indispensable party, the receiver in the underlying state court proceeding, whose interests in the underlying state court proceeding will be adversely affected by a temporary restraining order. For these reasons alone, the Court should deny this ex parte application.

Even if the Court were to find this ex parte application were procedurally proper, it should deny this application because (1) Plaintiffs have failed to apply the required California state law necessary to establish the basic requirements for a temporary restraining order - probable success on the merits and irreparable injury; (2) Plaintiffs have an adequate remedy at law but are circumventing the orders in a state court proceeding, without justification; and (3) multiple abstention doctrines, including the Younger and Burford abstention doctrines, guide this court to abstain from exercising jurisdiction in an ongoing state marital dissolution proceeding with important state interests.

This ex part application is without merit and is procedurally improper. Accordingly, Defendants respectfully request that this application be denied.

II. FACTS

A. The Federal Action

This action was brought by SINDICATO DE EMPLEADOS Y TRABAJADORES DE LA INDUSTRIA, EL CAMPO Y EL COMERCIO DEL ESTADO 29 C.R.O.M., a Mexican labor union, and SINDICATO NUEVA GENERACION DE TRABAJADORES DE BAJA CALIFORNIA C.R.O.C., a Mexican labor union (collectively "Plaintiffs") against Defendant CREDIT MANAGERS ASSOCIATION OF CALIFORNIA, INC., dba CMA BUSINESS CREDIT SERVICES, a California non-profit corporation ("Defendant") purportedly to recover assets of two

1 Mexican corporations, Alissimo, S.A. de C.V. ("Alissimo") and Resinas Laguna, S.A. de C.V.
 2 ("Resinas Laguna") to pay the wages of Plaintiffs' union members (the "Federal Action").
 3 Declaration of Roberto Quijano ("Quijano Decl."), ¶ 3-5. Plaintiffs assert that they, and not
 4 Plaintiffs' former employers, are the real party in interest who may assert claims against Defendant
 5 pursuant to an order in a Mexican Court identified as the "Junta Local de Conciliacion y Arbitraje de
 6 Tijuana" (the "Mexican Action") as set forth in the declaration of Roberto Quijano. Quijano Decl., ¶
 7 3, 4, 9, 10; Plaintiffs' Memorandum, 4:17-27. Said order, however, is not presented in Plaintiffs'
 8 complaint or in the declaration of Mexican Attorney Roberto Quijano. Quijano Decl., ¶ 12-15,
 9 Exhibit "A" – "D"; Complaint. Rather, Mr. Quijano's declaration states merely that "immediately
 10 upon filing of the Mexican Proceeding by Estado 29 and Nueva Generacion, the Mexican Court
 11 ordered a temporary freeze of all assets of both Alissimo and Resinas Laguna, wherever located."
 12 Quijano, ¶ 9. Plaintiffs, however, have failed to attach the order as an exhibit or to establish by
 13 competent California state law authority (or Mexican authority for that matter) or admissible
 14 evidence (aside from an unsupported declaration by Mr. Quijano) that Plaintiffs have present
 15 ownership of the assets of Alissimo or Resinas Laguna prior to the adjudication of Plaintiffs' petition
 16 in Mexican Court. Quijano ¶ 14-15, Exhibits "C" and "D" (Plaintiffs exhibits "C" and "D"
 17 demonstrate that the petition is pending hearings on December 20th and 26th respectively). Therefore,
 18 Defendant is unable to determine whether Plaintiffs have any present rights to Alissimo's or Regina
 19 Laguna's assets or are actually the real party interest in the Federal Action.

20 **B. The State Court Proceeding**

21 The underlying state court proceeding which Plaintiffs seek to enjoin is dissolution of
 22 marriage proceeding that was commenced by Allen Jones on April 3, 2002 (the "State Court
 23 Action"). Declaration Samuel Romero ("Romero Decl."), ¶ 2, and December 21, 2007 Motion
 24 ("Receiver Motion Ex "A'"), 3:5. On April 5, 2007, after five years of proceedings, Mrs. Mary Kay
 25 Jones moved for the appointment of a receiver over certain entities in which Mr. Jones had a partial
 26 or complete interest. Romero Decl., ¶ 3, Receiver Motion Ex "A", 3:5-9. Among these entities
 27 were Flex Trim California, Inc. ("FTC"), Flex Trim North Carolina, Inc. ("FTNC", and collectively
 28 with FTC, the "Flex Trim Entities"), and two Mexican corporations, Alissimo, S.A. de C.V.

1 (“Alissimo”) and Resinas Laguna, S.A. de C.V. (“Resinas Laguna”). Romero Decl., ¶ 4, Receiver
 2 Motion Ex “A”, 3:14-19, 6:21-22. In conjunction with the motion, Mrs. Jones provided supporting
 3 exhibits and declarations, and Mr. Jones provided an opposition and opposing declarations which
 4 were considered by the state court. Romero Decl., ¶ 5, Receiver Motion Ex “A”, 3:9-18. On May
 5 11, 2007, the state court appointed Dennis M. Murphy as receiver over the entities over which Mr.
 6 Jones had a partial or complete interest as set forth in the minute order attached to the Receiver’s
 7 December 21, 2007 Motion as Exhibit “B.” Romero, Decl. ¶ 6, Exhibit “B”. On May 22, 2007, the
 8 state court signed its written order appointing the Receiver. Romero Decl., ¶ 7, Exhibit “C”.

9 **C. The Assignment for Benefit of Creditors**

10 Notwithstanding the appointment of the Receiver, Mr. Jones, purporting to act for the Flex
 11 Trim Entities, on or about May 21, 2007, assigned the Flex Trim Entities’ assets to Defendant and
 12 commenced a proceeding referred to as an “Assignment for Benefit of Creditors.” Romero Decl., ¶
 13 8, Receiver Motion Ex “A”, 3:24-4:4. Although the timing of this assignment was suspicious to the
 14 Receiver as stated in the Receiver’s filed documents, the Receiver did not immediately contest the
 15 validity of the assignment because the Flex Trim entities were in financial distress. Romero Decl., ¶
 16 9, Receiver Motion Ex “A”, 4:9-14. In any case, the minute order appointing the Receiver over the
 17 Flex Trim entities on May 11, 2007 preceded the May 21, 2007 assignment to Defendant of the Flex
 18 Trim assets.

19 Given Defendant’s mandate to liquidate the Flex Trim entities’ assets, Defendant ran an
 20 auction process whereby it sold the Flex Trim Entities to the highest bidder. Romero Decl., ¶ 10,
 21 Receiver Motion Ex “A”, 4:16-5:12. On August 24, 2007, the court approved the sale pursuant to an
 22 ex parte application brought by the Receiver. Romero Decl., ¶ 11, Receiver Motion Ex “A”, 4:1-5.

23 **D. The Proposed Agreement Submitted to the State Court**

24 Defendant has been placed in the uncomfortable position between the Receiver and Plaintiffs.
 25 Defendant has reached an agreement with the Receiver which adequately protects the interest of
 26 multiple parties, including the Plaintiffs, by allowing Defendant to pay administrative, attorney and
 27 outside agent fees, priority claims, general unsecured employee claims, and general undisputed
 28 claims, and to place the remaining proceeds from the sale of the Flex Trim entities’ assets in the

control of the Receiver that was appointed by the state court. Romero Decl., ¶ 12, Receiver Motion Ex "A", 9:10-10:10.

E. The Agreement to Segregate Funds Pending Further Order of the State Court

Notwithstanding Plaintiffs representations to the contrary, the Receiver is not authorized to spend "the last remaining asset of Alissimo and Resinas Lagunas" to "satisfy the claims of Mary Kay Jones." Plaintiffs' Memorandum, 5:15-17. Rather, the Receiver requests authority from the state court in the December 21st calendared Motion for Defendant to distribute to the Receiver any remaining funds which must be held in a segregated account pending further order of the court. Romero Decl., ¶ 12, Receiver Motion Ex "A", 12:24-26. The Receiver has authority only to hold these monies until a further order of the state court is entered. *Id.*

F. The Plaintiffs and their Employers Have Had Notice and Opportunity to Intervene in the State Court Action.

Furthermore, although Plaintiffs assert that shares of Alissimo and Resinas Laguna were never owned by Mr. Jones, said statement provides an entirely distorted picture of the underlying action. Jose Coral Declaration, ¶ 2, 14. In truth, the Alissimo and Resinas Laguna's corporate documents provide that Mr. Jones was the sole administrator of both Alissimo and Resinas Laguna with all plenary powers required by Mexican law to administrate the entities, litigate and collect payments for the entities, and to take any necessary acts commensurate with ownership. Romero Decl., ¶ 12, Exhibit "D", 2-3, Exhibit "E", 4-5. Given Mr. Jones control over these entities, Plaintiffs' statements purporting to establish that the Alissimo and Resinas Laguna were denied due process by the appointment of the Receiver is disingenuous and misleading. At all relevant times set forth in the these documents, Mr. Jones has had the ability to intervene for both Alissimo and Resinas Laguna in the underlying action and make a claim for violation of due process. Romero Decl., ¶ 13, Exhibit "D", 2-3, Exhibit "E", 3-4. Through Mr. Jones, Alissimo and Resinas Laguna have had notice and an opportunity to object throughout the entire state court proceeding. In any case, Defendant is informed and believes that the Receiver has not taken actions to shut down Alissimo and Resinas Laguna, nor has it taken possession of Alissimo and Resinas Laguna's warehouse without legal process or frozen their bank accounts.

G. The Plaintiffs Have Been Afforded the Opportunity to Intervene in the State Court Action

Finally, both Alissimo and Resinas Laguna have been afforded notice of the December 21, 2007 motion and have been given notice and the opportunity to be heard in the state court action. Romero Decl., ¶ 14. As set forth in the declaration of Joshua J. Richman, Plaintiffs have a true and correct copy of the Receiver's December 21, 2007 motion and have attached portions of the motion as exhibits to Mr. Richman's declaration. Joshua J. Richman Declaration, ¶ 2-7. As set forth in the proof of service to said motion, Mr. Jose Corral and Mr. Francisco Elorza were served a copy of the December 21, 2007 motion by express mail on December 13, 2007. Romero Decl., ¶ 15, Exhibit "F". Therefore, Mr. Jose Corral, as shareholder for Alissimo, and Mr. Francisco Elorza, as shareholder for Resinas Laguna, have had notice and opportunity to intervene in the state court proceeding, but have failed to do so. Declaration of Jose Corral, ¶ 2, Declaration of Francisco Elorza, ¶ 2.

III. ARGUMENT

A. Plaintiffs' Ex Parte Application Must be Denied Because this Court is Without Authority to Enjoin a State Court Proceeding unless Expressly Authorized by Congress

28 USC § 2283 provides in relevant part:

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Federal courts do not have inherent power to ignore limitations of the Anti-Injunction Act (28 USCS § 2283) by enjoining state court proceedings merely because the state court proceeding interferes with a protected federal right, even when interference is unmistakably clear. This rule applies regardless of whether federal court itself has jurisdiction over the controversy. *Atlantic C. L. R. Co. v Brotherhood of Locomotive Engineers*, 398 US 281 90; S. Ct. 1739; 26 L. Ed. 2d 234 (1970); See also *Chick Kam Choo v Exxon Corp.*, 486 US 140, (1988) (criticized in *ONBANCorp, Inc. v Holtzman* (1997, ND NY) 1997 US Dist LEXIS 9502). Here, Plaintiffs' papers fail to provide any statutory grounds for this Court to restrain a lawful state court proceeding. Plaintiffs do not even cite

1 to the Anti-Injunction Act nor do they attempt to comply with its express requirements. In any case,
 2 even if Plaintiffs could prove that there was a due process violation in the state court proceeding,
 3 which there was not, this Court has no inherent power to restrain the underlying state court
 4 proceeding. Plaintiffs remedy, if any at all, must be adjudicated in the state court action.

5 **B. Plaintiffs' Compliant Does Not Establish this Court's Jurisdiction**

6 Fed. R. Civ. P. 17(a) requires that "every action shall be prosecuted in the name of the real
 7 party in interest." The determination of the real party in interest in a diversity suit is dependent on
 8 whether the party is the "proper party to maintain the action under applicable state law It is well
 9 settled that a federal court exercising diversity jurisdiction must apply substantive state law." *Allstate*
 10 *Ins. Co. v. Hughes*, 358 F.3d 1089, 1093-1094 (9th Cir. 2004). Arguments based on the adequacy of
 11 the Court's jurisdiction may be raised in opposition to an application for provisional injunction relief.
 12 *Cook v. Peter Kiewit Sons Co.*, 775 F.2d 1030, 1034 (9th Cir. 1985) *cer denied*, 476 U.S. 1183
 13 (1986). Here, Plaintiffs' complaint and ex parte paper's fail to apply any California case law or
 14 statutory authority demonstrating that Plaintiffs' are the real party in interest in this action. Plaintiffs'
 15 claims are based entirely on claims that must be brought, if at all, by Alissimo and Resinas Laguna
 16 pursuant to their purported right to the proofs of claim submitted to the Defendant. Moreover,
 17 Plaintiffs' citation to the Mexican court order and opaque references to Mexican law is improper,
 18 both procedurally and substantively. Plaintiffs provide no competent evidence of the Mexican order
 19 and do not apply California law to establish that Plaintiffs have acceded to Alissimo's and Resinas
 20 Lagunas claims. Therefore, this Court is without jurisdiction to adjudicate this claim.

21 **C. Plaintiffs Have Failed to Join the Receiver, an Indispensable Party**

22 Fed. R. Civ. P. 19 (a) provides in relevant part:

23 [p]erson who is subject to service of process and whose joinder will not deprive the
 24 court of subject-matter jurisdiction must be joined as a party if:

25 (A) in that person's absence, the court cannot accord complete relief among
 26 existing parties; or

27 (B) that person claims an interest relating to the subject of the action and is so
 28 situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Likewise, "where a number of persons have an undetermined interest in the same property or fund, each is an **indispensable party** to an action by the other to obtain his or her share of the property or fund. *In re Republic of Philippines* 309 F.3d 1143, 1153 (9th Cir. 2002) (emphasis added); *Arizona Laborers, Teamsters & Cement Masons Local 395 Health & Welfare Trust Fund v. Conquer Cartage Co.*, 753 F.2d 1512, 1521 (9th Cir. 1985). Schwarzer, Tashima & Wagstaffe, CAL. PRAC. GUIDE: FED. CIV. PRO. BEFORE TRIAL (The Rutter Group 2007) 7:124. Here, Plaintiffs assert that the Receiver is seeking to distribute "the last remaining asset of Alissimo and Resinas Lagunas" to "satisfy the claims of Mary Kay Jones." Plaintiffs' Memorandum, 5:15-17. Therefore, the Receiver, pursuant to Plaintiffs own arguments, claims an interest in the subject matter of the action. Therefore, without joining the Receiver, this court will impair and impede the Receiver's ability to protect the interests of the creditors of the Flex Trim Entities in the proceeds from their sale. Furthermore, because Plaintiffs assert an undetermined interest in the same funds claimed by the Receiver, the Receiver is an indispensable party to this action. Therefore, Plaintiffs' have failed to join an indispensable party or to provide it notice of this proceeding and on that basis the ex parte application should be denied.

D. Plaintiffs have failed to Apply California State Law Necessary to Establish the Requirement for a Temporary Restraining Order

"The standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction. In the Ninth Circuit, a district court may issue a preliminary injunction when the moving party demonstrates either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) the existence of serious questions going to the merits and the balance of hardships tips sharply in its favor. [citation omitted]. These formulations are not different tests but represent two points on a sliding scale in which the degree of irreparable harm increases as the probability of success on the merits decreases." [citation omitted]. However,

1 although the degree of irreparable harm may be low if the probability of success on the merits is
2 high, the moving party must in any case 'demonstrate a significant threat of irreparable injury.'
3 [citation omitted] . . . preliminary injunctive relief is not available unless the moving party can
4 demonstrate some "fair chance of success on the merits, or questions serious enough to require
5 litigation." *Lockheed Missile & Space Co. v. Hughes Aircraft Co.*, 887 F. Supp. 1320, 1323 (D. Cal.
6 1995).

7 Notably, Plaintiffs have failed to establish the basic requirements necessary for a temporary
8 restraining order – probable success on the merits and irreparable injury. Under the *Erie* doctrine, the
9 federal courts must apply the substantive law of the forum state in diversity of citizenship actions.
10 *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78; 58 S. Ct. 817, 821; 82 L. Ed. 1188, 1194 (1938). Thus,
11 in assessing the merits of a request for injunctive relief in a diversity of citizenship action, federal
12 courts usually apply state law. *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 327-328; 58 S. Ct. 578,
13 580-81; 82 L. Ed. 872, 875-76 (1938). In this action, Plaintiffs have asserted California state law
14 claims in their complaint for breach of contract, account stated, goods sold and delivered, and
15 equitable relief. Plaintiffs' Memorandum, 6:25-27. Because each of Plaintiffs' claims are based on
16 diversity jurisdiction, Plaintiffs must establish probable success on the merits by applying California
17 state law. However, Plaintiffs' ex parte papers are completely devoid of any proof supporting the
18 amount of Plaintiffs' employer's proof of claim or of any of the required California statutory or case
19 law authority necessary to prove that Plaintiffs will have probable success on the merits in this action.
20 Indeed, rather than properly support the merits of Plaintiffs' purported state law claims, Plaintiffs
21 assert preferential rights pursuant to Mexican law but provide no basis for the application of Mexican
22 law to this proceeding. Quijano Decl., ¶10-11, Supplement Quijano Decl., ¶ 2-3.

23 More importantly, Plaintiffs' own exhibits establish that there will be no irreparable injury to
24 Plaintiffs if the underlying state court proceeding is not enjoined. Specifically, the proposed order
25 that Plaintiffs seek to enjoin requires the Defendant to pay the Receiver all remaining funds held by
26 Defendant, and for the Receiver to segregate these funds pending further order of the state court.
27 Romero Decl., ¶ 12, Receiver Motion Ex "A", 12:24-26. Plaintiffs will have further opportunity
28 beyond December 21, 2007 to intervene in the state court proceeding and to seek an order from the

1 state court for payments to Plaintiffs in lieu of payments to their employers on their employers'
 2 pending claims. Furthermore, Plaintiffs' claims are overstated because Defendant must not only pay
 3 all creditors of the Flex Trim Entities pro rata, and but Plaintiffs' wages claims against the Alissimo
 4 and Regina Laguna must also be a fraction of the actual claim by Alissimo and Regina Laguna
 5 against the Flex Trim Entities. In any case, Plaintiffs have provided no accounting demonstrating
 6 that the amount segregated will not be sufficient to cover their claims. Therefore, Plaintiffs have
 7 failed to establish an irreparable injury or probable success on the merits and on that basis the ex
 8 parte must be denied.

9 **E. Plaintiffs had Ample Notice of the December 21, 2007 Motion and an Adequate**
 10 **Remedy at Law in the State Court Action**

11 When a party appears to have alternative legal remedies available to redress its legal
 12 grievance, the court may deny the request for a temporary restraining order. *Our Co. v. Eagle*
 13 *Snacks, Inc.*, 812 F. Supp. 6, 7-8 (D. Me. 1993). Plaintiffs and their employers have had ample
 14 notice (as admitted by the Plaintiffs in the ex parte papers) and ample opportunity to intervene in the
 15 state court proceeding and oppose the proposed transfer of funds to the Receiver, but have failed to
 16 do so. Rather, Plaintiffs seek to avoid the adequate remedies at law available in the state court
 17 proceedings entirely, without justification. Indeed, Mr. Jones has had plenary power to intervene for
 18 both Alissimo and Resinas Laguna in the underlying action and make a claim based on the alleged
 19 violation of due process. Romero Decl., ¶ 13, Exhibit "D", 2-3, Exhibit "E", 3-4. Even if the
 20 December 21, 2007 were granted, the Receiver is not authorized to spend "the last remaining asset of
 21 Alissimo and Resinas Lagunas" to "satisfy the claims of Mary Kay Jones." Plaintiffs'
 22 Memorandum, 5:15-17. Instead, the Receiver must hold the remaining funds in a **segregated**
 23 **account pending further order of the court.** Plaintiffs have an adequate remedy at law in the state
 24 court proceeding because they can still intervene in the state court proceeding to seek an order from
 25 the state court for further payments to Plaintiffs.

26 **F. Abstention Doctrines Support the Court Abstention from this Action**

27 Finally, a panoply of abstention doctrines suggest that this Court should abstain from this
 28 proceeding entirely. Specifically, under the "Younger abstention" doctrine, Courts properly abstain

1 from exercising jurisdiction whenever federal claims could be presented in an ongoing state court
 2 proceeding that concerns important state interests. *Younger v. Harris*, 401 U.S. 37, 49-53; 91 S. Ct.
 3 746, 753-7; 27 L. Ed. 2d 669, 673-7 (1971). The adjudication of family law disputes is a recognized
 4 “important state interest” within the meaning of the Younger abstention doctrine. See e.g., *Moore v.*
 5 *Sims*, 442 U.S. 415, 435; 99 S. Ct. 2371, 2383; 60 L. Ed. 2d 994, 1010 (1994). See also 1 Schwarzer,
 6 J., , Tashima, J., Wagstaffe, Federal Civil Procedure Before Trial, 2:1291.2, 2E-40 (Rev. #1 TRG
 7 2007). Likewise, the Ninth Circuit has specifically protected the interests of a receiver appointed to
 8 effectuate a court ordered mandate from injunctive relief. *Lebbos, et al. v. Superior Court*, 883 F.2d
 9 810, 816 (9th Cir. 1989) (District Court properly abstained from considering whether receiver’s
 10 injunctive and declaratory relief claims were proper because appellants could have challenged, in the
 11 state court, the constitutionality of the statutes on which they were predicated).

12 Here, the State of California has important state interests in the dissolution of the Jones
 13 marriage. Moreover, the Receiver was appointed by the State Court prior to the assignment for the
 14 benefit of creditors. Therefore, it is proper for the federal court to abstain from interfering in a matter
 15 of important state interest.

16 Finally, another ground for abstention is recognized where a case presents an issue which
 17 clearly involves of state law policy subject to adequate state court review. See *Burford v. Sun Oil*
 18 *Co.*, 319 U.S. 315, 334, 63 S.Ct. 1098 (1943); *Fireman’s Fund Ins. Co. v. Quackenbush*, 87 F.3d
 19 290, 296 (9th Cir. 1996). Burford abstention has been invoked where a federal case depends on a
 20 determination of a domestic relationship, such as dissolution of marriage. See *Ankenbrandt v.*
 21 *Richards*, 504 U.S. 689, 704, 112 S.Ct. 2206 (1992).

22 Elaborating on the circumstances justifying the application of “Burford abstention” doctrine,
 23 the Ninth Circuit required the consideration of the following standard: (1) whether the state has
 24 concentrated suits involving the local issue in a particular court; (2) whether the federal issues
 25 presented cannot be easily separated from the complicated state law issues with which the state
 26 courts may have special competence; and (3) whether federal review might disrupt state efforts to
 27 establish a coherent policy. *Fireman’s Fund Ins. Co. v. Quackenbush*, 87 F.3d at 296; *Tucker v. First*
 28 *Maryland Savings & Loan, Inc.*, 942 F.2d 1401, 1405 (9th Cir. 1991).

As plainly evidenced by the order appointing the Receiver, the underlying state court proceeding has been ongoing for five years, and involves control over multiple business entities which the state court concentrated in one proceeding by appointing the Receiver. Here, federal review may disrupt the state court's efforts to establish a coherent policy in this marital dissolution. Therefore, this Court has sufficient grounds to deny this ex parte application, based on comity and the above abstention doctrines.

G. The Balance of the Equities Supports Denial of the Ex Parte

In assessing whether to grant a request for a temporary restraining order, a court must also consider the balance of the hardships between the parties. If the harm faced by the non-movant would be greater if no action is taken, that determination will weigh against granting a temporary restraining order. *National Football League Players' Ass'n v. Pro-Football, Inc.*, 849 F. Supp. 1, 2 (D.D.C. 1993) (court denied temporary restraining order requesting suspension of non-dues-paying union members because loss to football league and public would outweigh harm to union). Here, notwithstanding Plaintiffs' unsupported accounting, if the ex parte is denied, funds necessary for payments to Plaintiffs will be segregated and Plaintiffs may assert their claims in the state court action. In contrast, if the ex parte is granted, Defendants will accrue additional costs to administer the funds, further interfere with the court appointed receiver, and be prevented from timely issuing payment to priority creditors and employees with undisputed claims.

H. The Public Interest Supports Denial of the Ex Parte

In deciding upon a request for a temporary restraining order, the court must also consider the effect of its ruling on the public interest. Where the public interest will suffer, the Court may deny an temporary restraining order. *Goshen Road Envtl. Action v. United States Dep't of Agric.*, 891 F. Supp. 1126, 1132 (E.D.N.C. 1995). Here, Plaintiffs seek to prevent the pay out of monies due on priority claims, California employee wage claims, and undisputed unsecured claims. If this TRO is granted, Defendant will be prevented from issuing payouts to employees concurrent with the holiday season.

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4 **IV. CONCLUSION**

5 Based on the above, Defendants respectfully request that this court deny this ex parte
6 application.

7 **SHULMAN HODGES & BASTIAN LLP**

8 Dated: December 20, 2007

9 By: 

10 Leonard M. Shulman

11 Samuel J. Romero

12 Attorneys for Defendant, Credit Managers

13 Association of California, Inc., dba CMA

14 Business Credit Services, a California non-profit
15 corporation

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the City of Foothill Ranch, County of Orange, State of California. I am over the age of 18 years and not a party to the within action. My business address is 26632 Towne Centre Drive, Suite 300, Foothill Ranch, California 92610. On December 20, 2007, I served the documents named below on the parties in this Action as follows:

DOCUMENT(S) SERVED: **DEFENDANTS' OPPOSITION TO PLAINTIFFS' EX PARTE APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

SERVED UPON: **Counsel for Plaintiffs**
Guillermo Marrero
Joshua J. Richman
1350 Columbia Street, Suite 500
San Diego, CA 92101
Telephone: (619) 515-1408
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jrichman@ipglaw.com

☐ (BY FACSIMILE) The above-referenced document was transmitted by facsimile transmission and the transmission was reported as completed and without error. Pursuant to C.R.C. 2009(i), I either caused, or had someone cause, the transmitting machine to properly transmit the attached documents to the facsimile numbers shown on the service list.

☐ (BY OVERNIGHT DELIVERY) I am readily familiar with the practice of Shulman Hodges & Bastian LLP for collection and processing of documents for overnight delivery and know that the document(s) described herein will be deposited in a box or other facility regularly maintained by Federal Express or Overnite Express for overnight delivery or by Express Mail via the United States Postal Service.

☒ (BY E-MAIL OR ELECTRONIC TRANSMISSION) Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent to the persons at the e-mail addresses as listed above and/or on the attached Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

☐ (BY PERSONAL SERVICE) I delivered to an authorized courier or driver authorized by ASAP Corporate Services, Inc. to receive documents to be delivered on the same date. A proof of service signed by the authorized courier shall be filed upon receipt from ASAP Corporate Services, Inc.

☒ (FEDERAL) I declare that I am employed in the office of a member of the bar of this court, at whose direction this service was made. I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 20, 2007, at Foothill Ranch, California.


Jackie Rodriguez